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REPORT
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JUDICIAL IMMUNITY RESTORATION ACT

SEPTEMBER 18 (legislative day, SEPTEMBER 10), 1990.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 590]

The Committee on the Judiciary, to which was referred the bill (S. 590) to prohibit injunctive relief, or an award of costs, including attorney's fees, against a judicial officer for action taken in a judicial capacity, having considered the same, reports favorably thereon without amendment and with an amendment to the title and recommends that the bill, as amended, do pass.

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I. PURPOSE

S. 590, as reported, would help restore the doctrine of judicial immunity to the status it occupied prior to the Supreme Court's deci-

S523-19.

sion in *Pulliam* v. *Allen.*[1] It would do so by amending the statutes underlying the decision to preclude the direct threat now posed to the independence of both the State and Federal judicial systems.

First, the bill would bar costs, including attorney's fees, against a State judge under 42 U.S.C. 1988 for actions taken in a judicial capacity that are not in excess of such officer's jurisdiction, that is, it would codify as to costs and attorney's fees the immunity doctrine as it now applies to direct damages. Second, the bill would bar a Federal judge from enjoining a State judge under 42 U.S.C. 1983 unless a declaratory decree was violated or declaratory relief was unavailable, that is, it would limit the award of injunctive relief to those rare occasions when an adequate remedy at law is not available. Also, the bill would bar costs and attorney's fees against Federal as well as State judges acting in their judicial capacity under any other provision of law, including the potential for costs and attorney's fees under the so-called *Bivens* actions alleging constitutional torts by Federal judges.[2]

This legislation would not fully restore the doctrine of judicial immunity to its pre-*Pulliam* state because lawsuits still could be filed against judges who would be subject to orders for declaratory relief in the first instance as well as for injunctive relief if a declaratory decree is violated or is not available. But the legislation would

> (1) discourage frivolous or harassing lawsuits that threaten the ordered and objective decisionmaking essential to the judicial process, and
>
> (2) enhance established concepts of comity and federalism in accordance with the principles of equitable relief essential to the integrity of State judicial proceedings under our dual system of State and Federal courts.

These critical goals would be reached without denying any citizen his or her day in court.

II. Legislative History

The immunity issues raised by *Pulliam* were the subject of hearings on October 29, 1985, in the 99th Congress. The Subcommittee on the Constitution reported S. 1795, as amended, which would have given judges personal immunity from fee awards under 42 U.S.C. 1988 by providing that:

> * * * no justice, judge, or judicial officer shall be held personally liable for any costs, including attorney fees, in any proceeding brought against such justice, judge, or judicial officer for actions taken in an official capacity.

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[1] 466 U.S. 522 (1984).

[2] In *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court enunciated the doctrine of "constitutional tort," which subjects Federal officials to suits for violation of Federal constitutional rights in a manner equivalent to 42 U.S.C. 1983 actions against State officials. In addition, in *Butz* v. *Economu*, 438 U.S. 478 (1978), the Supreme Court said that it would be inappropriate to distinguish for immunity purposes between State and Federal officials. This has led some to believe that Federal judges also may be subject to fee awards in cases alleging Federal constitutional torts. See Weisberger, "The Twilight of Judicial Independence—*Pulliam* v. *Allen*," Suffolk U.L. Rev. 537 (1985).

This bill would have barred attorney fee awards against a judge for all of his or her official actions. However, it was never considered by the full Judiciary Committee.

On February 26, 1988, the Subcommittee on Courts and Administrative Practice held a hearing to consider S. 1515, along with two other bills that were introduced in the 100th Congress to address the *Pulliam* decision.[3] On May 18, 1988, the subcommittee reported S. 1515, as amended, to the full Judiciary Committee. On August 3, 1988, the Committee on the Judiciary ordered the bill, as amended, favorably reported.

S. 1515 would have amended 42 U.S.C. 1988 by providing that:

> * * * in any action brought against a judicial officer for an act or omission committed in such officer's judicial capacity—
>
> (1) such officer shall not be liable for costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction; and
>
> (2) injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Section 2 would have added the following at the end of the first sentence of 42 U.S.C. 1983:

> except that in any action brought against a judicial officer for an act or omission committed in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

A freestanding section 3 also provided:

> Notwithstanding any other provision of law, no judicial officer shall be held liable for any costs, including attorney's fees, in any proceeding brought against such judicial officer for an act or omission taken in a judicial capacity.

A freestanding section 4 also provided:

> Notwithstanding any other provision of law, no federal court shall issue an injunctive or declaratory order against a judicial officer of a state for an act or omission committed in such officer's judicial capacity, unless it is determined that there is not an adequate remedy in state court

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[3] The bills, in addition to S. 1515, are S. 1512 and section 614 of S. 1482, proposed respectively by the Conference of Chief Justices and the Judicial Conference of the United States. S. 1512 would have added the following at the end of 42 U.S.C. 1988:

> Except that no justice, judge or judicial officer of a court of a State, shall be held liable for any costs, including attorney fees, in any proceeding brought against such justice, judge, or judicial officer for actions taken in an official capacity.

A freestanding section 2 also provided:

> Notwithstanding any other provision of law, no justice, judge, or judicial officer of a court of a State, shall be held liable for any costs, including attorney fees, in any proceeding brought against such justice, judge, or judicial officer for actions taken in an official capacity.

Section 614 of S. 1482 would have added the following at the end of 42 U.S.C. 1988:

> provided that no such fees shall be awarded against a judge or judicial officer who would be immune from actions for damages arising out of the same act or omission about which complaint is made.

> and there is imminent danger of irreparable harm to the petitioner.

This bill would have prohibited injunctive relief, or award of damages against a judicial officer for action taken in a judicial capacity. However, it was never considered by the full Senate.

On October 25, 1989, the Subcommittee on Courts and Administrative Practice held a hearing on S. 590, introduced in the 101st Congress to address the issue of judicial immunity. This bill dropped the exhaustion remedies included in section 4 of S. 1515. Witnesses at the hearing included: the Honorable Harry L. Carrico, chief justice of the Supreme Court of Virginia, on behalf of the Conference of Chief Justices; the Honorable Phillip J. Roth, Circuit Court of Oregon, and the Honorable Joseph R. Weisberger, associate justice of the Supreme Court of Rhode Island, who both testified on behalf of the American Bar Association; the Honorable Thomas C. Nurre, Ohio Court of Common Pleas, on behalf of the American Judges Association; and M. Caldwell Butler, attorney, on behalf of the Virginia Committee Against *Pulliam*.

On March 1, 1990, the subcommittee, a quorum being present, considered S. 590 and, after adopting an amendment offered by Senator Heflin, reported the bill, as amended, to the full Judiciary Committee.

The subcommittee amended S. 590 as follows:

> Amend the title so as to read: "To prohibit injunctive relief, or an award of costs, including attorney's fees, against a judicial officer for action taken in a judicial capacity."

This amendment substitutes "costs, including attorney's fees" for "damages" in order to reflect the substance of the bill.

III. Discussion

A. The "Pulliam" Decision

The problems posed for judicial immunity and for our system of federalism have arisen because of the manner in which the issues in *Pulliam* were presented to the Supreme Court. The case can be briefly summarized. A magistrate in Culpepper County, VA, incarcerated two individuals for failure to make bond for offenses which, upon conviction, were nonjailable under Virginia law, that is, they carried a maximum penalty of a $500 fine in the case of one individual and a $100 fine for the other individual. After their cases were completed, these two individuals brought an action under 42 U.S.C. 1983 against the magistrate in the District Court for the Eastern District of Virginia. The court found that the magistrate's practice of requiring a bond for nonincarcerable offenses was unconstitutional on due process and equal protection grounds and the court enjoined the magistrate from further actions of a similar nature.

In addition, the district court awarded $7,691, including $7,038 in attorney's fees, to the plaintiffs as costs. Instead of appealing the injunction, challenging the need for equitable relief and asserting the availability of State remedies, the magistrate appealed only

from the award of attorney's fees with judicial immunity as the only defense. Accordingly, the Fourth Circuit Court of Appeals first had to decide whether the injunctive relief that triggered the fee award was proper. It then held that the magistrate was not immune from either injunctive relief or attorney's fees. The Supreme Court affirmed, expressly holding that judicial immunity is not a bar to injunctive relief in Federal civil rights actions (42 U.S.C. 1983) against a member of the State judiciary acting in a judicial capacity, or to the award of attorney's fees under the Civil Rights Attorney's Fees Awards Act (42 U.S.C. 1988). In so holding, the Court broke with 400 years of common-law doctrine and sent shock waves through the entire judicial community.

By the time the case was over, the attorney's fees for which the magistrate was liable soared to $88,000, but ultimately were set by agreement of the parties at $43,691. The State of Virginia agreed to pay the bill. Had it not, the magistrate would have been personally liable.

The opinion of the Court, by Mr. Justice Blackmun, and the dissent by Mr. Justice Powell, were at odds on all the major findings.

The dissent found that the doctrine of judicial immunity was a complete bar to both injunctive relief and fee awards; it rejected the distinction drawn between direct damages and attorney's fees; and it faulted the majority's reading of the English common law and the Court's earlier decisions of which it based its findings. As to the English precedents, Justice Powell said:

> * * * the perceived analogy to the use of prerogative writs at English common law simply does not withstand analysis. * * * the analogy rests on a peculiar practice at English common law that was occasioned by the unique relationship between the King's Bench and England's ecclesiastical courts. That relationship finds no parallel in this Appellate Procedure, have sought to limit the use of mandamus and prohibition for the very purpose of protecting judicial immunity. It is extraordinary, therefore, that the Court today should rely on the use of prerogative writs in England to justify exposing judicial officials in this country to harassing litigation and to subject them to personal liability for money judgments in the form of costs and attorney's fees.[4]

The majority conceded that "[t]here is, perhaps, some logic" to the argument that "the chilling effect of a damages award is no less chilling when the award is denominated attorney's fees." [5] But the majority also stated

> * * * that Congress intended section 1983 to be an independent protection for federal rights and [we] find nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from federal collateral review.[6]

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[4] 466 U.S. at 553.
[5] *Id.* at 543.
[6] 466 U.S. at 541.

In his dissent, Justice Powell responded by noting that the Court earlier had observed, in *Supreme Court of Virginia* v. *Consumer's Union of the United States*,[7] that " '[t]here is no * * * indication in the legislative history of the act to suggest that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute legislative immunity.' " "Similarly," he said, "there is no indication in the legislative history of the act to suggest that Congress intended to diminish the scope of judicial immunity." [8]

In testimony before the Subcommittee on the Constitution on October 29, 1985, this point was emphasized by the spokesman for the Conference of Chief Justices, Edwin J. Peterson, who reviewed the legislative history of 42 U.S.C. 1988 and concluded that:

> While Congress did not specifically exclude judges from the Act, it did not show a specific intent to include them either. As best we can determine the issue simply was not discussed. There is no specific comment in the Senate report; certainly no reference to any intent to limit judicial immunity or to create a new right to fees against judges. Instead, the report made it clear that: "This bill creates no startling new remedy—it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorney's fees which had been going on for years prior to the Court's [Alyeska] decision." [9]

The House report also was silent on the issue of judicial immunity. This led the Conference of Chief Justices to conclude that "Congress' failure to specify one intent or the other on judicial immunity was meant to ratify prevailing practice and this did not include fee awards against the judiciary. * * *" [10]

State judicial officials believe that *Pulliam* would have been decided differently, with the doctrine of judicial immunity remaining intact, had the magistrate appealed the injunction. They contend that injunctive relief was not in order because it did not meet the twin requirements for equitable relief:

(1) the showing of an inadequate remedy at law and

(2) the serious risk of irreparable harm.

Had the injunction been appealed, they contend, the fourth circuit would have examined the need for equitable relief and found it unnecessary absent an exhaustion of the State remedies that clearly were available.

This point was made in the dissent by Justice Powell, who cited two specific remedies, the right to appeal unreasonable bail determinations and the writ of habeas corpus, available under Virginia law. Thus, he said,

> [a]dequate remedies were expressly available to each of the respondents * * *. Nor was there any showing in this case

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[7] 446 U.S. 719 (1980).

[8] 466 U.S. at 546 n. 3.

[9] *See* Senate Report No. 94-1011 at 6.

[10] Legal Fees Equity Act: Hearings on S. 1580, S. 1794, and S. 1795 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 99th Cong., 1st Sess., J-99-64 (statement of Edwin J. Peterson, Chief Justice of the Supreme Court of Oregon).

> of irreparable harm in the absence of injunctive relief. Nevertheless, petitioner was forced to bear the burdens of extended litigation, making clear the need for absolute judicial immunity.[11]

The Court itself, in finding that judicial immunity was not a bar to injunctive relief, went on to say that:

> In so concluding, we express no opinion as to the propriety of the injunctive relief awarded in this case. Petitioner did not appeal the award of injunctive relief against her. The Court of Appeals therefore had no opportunity to consider whether respondents had an adequate remedy at law, rendering equitable relief inappropriate, or whether the order itself should have been more narrowly tailored. On the record before us and without the benefit of the Court of Appeals' assessment, we are unwilling to speculate about these possibilities.[12]

The *Pulliam* decision, then, because of the manner in which the issues were raised, creates two critical problems for the independence of the judiciary. First, it makes judges personally liable for court costs and large attorney fee awards that are tantamount to direct money damages and thereby encourage harassing litigation. Second, it encourages litigants to challenge State decisions by collateral attacks in the Federal courts rather than seek the relief routinely available to them as a matter of right within the State judicial systems.

B. THE NEED FOR THE LEGISLATION

This legislation is essential if

(1) the doctrine of judicial immunity is to fulfill its historic function of protecting the independence of the judiciary, and

(2) our long history of judicial federalism is to be preserved.

The ancient doctrine of judicial immunity, freeing judges from the threat of costly and time-consuming collateral attacks on their judicial decisions, is essential to the orderly resolution of disputes and the freedoms that we enjoy under our Constitution and the rule of law.

It is redundant to say that judges are in the business of judging. But it helps to emphasize that judges are required, more so than most other public officials, to make on a daily basis judgments that directly affect our most precious rights as individuals. Virtually every case, whether a civil dispute or a criminal prosecution, results in judgments favoring one party over another. These judg-

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[11] 466 U.S. at 553-54. Justice Powell said the two remedies for alleged unlawful detention under the Virginia Code are:

(1) Section 8.01-6545 which provides that a "writ of habeas corpus * * * shall be granted forthwith by any circuit court" to any person who shows there is probable cause to believe he is being unlawfully detained; and

(2) Section 19.2-124 which provides a specific procedure for appealing unreasonable bail determinations "successively to the next higher court * * * up to the Supreme Court of Virginia".

He also noted that the Virginia statute that permitted jail time for nonincarcerable offenses, if the arrestee posed a danger to himself or others, was repealed before the Supreme Court's opinion in *Pulliam* was handed down. 466 U.S. 553-54. n. 13.

[12] *Id.* at 542-43.

ments often affect large groups or classes of people other than the litigants directly involved.

It follows that judges are at the center of controversy and high emotions in their daily work, but most make dispassionate and objective evaluations of the facts plus reasoned applications of the law if there is to be a just and fair result. A typical judge makes thousands of controversial decisions over the course of even a brief career on the bench. Many of these decisions involve difficult factual and legal determinations, often involving unsettled questions of law or settled questions that can change on appeal. Judicial immunity, therefore, is not for the protection of the judge but for the protection and integrity of the judicial process. It is essential to the rule of law.

Until the *Pulliam* decision was handed down on May 14, 1984, the venerable doctrine of absolute judicial immunity,[13] together with the carefully devised concepts of comity and federalism in accordance with the principles of equitable relief, had been relied on to protect the judicial decisions of State judges from collateral attacks through harassing and vexatious suits for damages or orders for declaratory or injunctive relief by a Federal district court.

It was enormous shock to State judicial officials and many of their colleagues on the Federal bench, therefore, when the Supreme Court effectively reversed the rules that had applied for the nearly 200 years of our national life and, as to the doctrine of judicial immunity itself, for an additional 200 years in the common law of England. While continuing to uphold the immunity doctrine as a bar to direct money damages against a judge for his or her judicial decisions, the *Pulliam* Court said it was unwilling, absent a specific statutory exemption, to extend it to injunctive relief under 42 U.S.C. 1983 or attorney fee awards under 42 U.S.C. 1988.

Legislation to help restore the *status quo ante* has been proposed by the Nation's leading judicial and bar organizations because the Court stated in *Pulliam* that

> * * * it is for Congress, not this Court, to determine whether and to what extent to abrogate the judiciary's common-law immunity.[14]

The American Bar Association, the Judicial Conference of the United States, the Conference of (State) Chief Justices, the American Judges Association, and other legal and judicial organizations adopted policy positions urging Congress to explicitly provide that the common-law doctrine applies to attorney's fees as well as direct damages. The ABA later extended its position to call for reasonable limits on Federal injunctions against State judicial officials and was supported in this by other organizations including the CCJ and AJA.

The Conference of Chief Justices, expressing great concern for the principles of federalism and comity, noted that State courts are as concerned about Federal constitutional rights as are the Federal courts and are equally capable of protecting those rights. Thus,

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[13] See Weisberger, *"The Twilight of Judicial Independence—Pulliam* v. *Allen"*, 19 Suffolk U.L. Rev. 537.

[14] 466 U.S. at 543.

they also urge Congress to bar Federal injunctive relief unless it is clearly demonstrated that an adequate remedy is not available under State law and there is danger of irreparable harm. No evidence has been presented indicating that State courts are unwilling to address an alleged violation of a constitutional right in a timely manner.

Representatives of the judiciary testifying at the hearings on S. 590 were unanimous in the view that fee awards against judges are as destructive to judicial independence as direct damages. Combined with injunctive relief, they not only threaten the individual judge's ability to decide close, controversial and complex issues without fear of retribution, but they threaten the independence of State court systems themselves.

These fee awards and costs have posed a very real threat to individual judges. The pressure these cases place on judicial independence is clear. In *Consumer Union of the United States Inc.* v. *American Bar Association* (E.D. Va. 1981) F. Supp. 822, attorney's fees were awarded against the Supreme Court of Virginia for litigation over the constitutionality of the promulgation and enforcement of a rule prohibiting attorney advertising. The Supreme Court of Virginia ultimately settled for $98,000 in attorney's fees. Similarly, attorney's fees of some $35,000 have been awarded by the U.S. District Court for the District of Oregon against Chief Justice Edwin J. Peterson of the Oregon Supreme Court, and others, in a case in which the district court enjoined recoupment of attorney's fees from acquitted indigent defendants as provided in the Oregon recoupment statute.

Even where the State has ultimately paid the fees imposed by these cases, the fact remains that each case that joins a judge places an open-ended financial threat against the judge for making an honest judicial decision for which a governmental unit may not be liable (see *Kentucky* v. *Graham*, 473 U.S. 159 (1985)), which held that fees could not be recovered from a governmental entity when Government employees are sued in their personal capacities). While such a case is pending, the judge might be unable to buy a house or gain credit for purchase of a car. Such circumstances have a direct impact on the lives of judges. Moreover, only 20 States protect judges against fee awards by some kind of indemnification or tort claims statute and some of these statutes are limited to their coverage. Only 10 States cover all State employees including court administrators. Therefore, judicial officials in at least 30 States could be found personally liable for fee awards unless their legislatures acted to protect them.

It has always been clear that absolute judicial immunity does not protect a judge's private or unofficial acts. The Supreme Court also made clear in *Forrester* v. *White*[15] that judicial immunity does not apply to all of a judge's *official* duties, including administrative actions such as the hiring and firing of court personnel. But the Court has never deviated from the view that judicial immunity protects a judge from direct damages for his or her *judicial* decisions when made within the scope of proper jurisdiction.

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[15] 484 U.S. 219 (1988).

Despite the limitations on judicial immunity in *Forrester* v. *White*, however, S. 590 responds only to *Pulliam* v. *Allen*, the case posing the most serious threat to the independence of the judiciary, State and Federal, as well as the integrity of State judicial proceedings.

The judicial process cannot function efficiently, or render objective justice, if the well-reasoned and conscientious decision of a State judge may result in the judge himself or herself being named defendant in costly and time-consuming litigation in the Federal courts.

IV. Vote of the Committee

On July 26, 1990, S. 590, as reported by the subcommittee, was considered by the full committee. With a quorum present, by voice vote, the Committee on the Judiciary ordered the bill, as amended by the subcommittee, favorably reported. There were four votes recorded in the negative. During committee consideration of the bill, there were no amendments offered to the bill.

V. Text of Bill, as Reported

[S. 590, 101st Cong., 1st Sess.]

A BILL To prohibit injunctive relief, or an award of damages against a judicial officer for action taken in a judicial capacity

Be it enacted by the Senate and House of Representatives of the United States of America in Congress, assembled, That section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting before the period at the end thereof ", except that in any action brought against a judicial officer for an act or omission committed in such officer's judicial capacity—

"(1) such officer shall not be liable for costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction; and

"(2) injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

Sec. 2. Section 1979 of the Revised Statutes (42 U.S.C. 1983) is amended by adding before the period at the end of the first sentence: ", except that in any action brought against a judicial officer for an act or omission committed in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable".

Sec. 3. Notwithstanding any other provision of law, no judicial officer shall be held liable for any costs, including attorney's fees, in any proceeding brought against such judicial officer for an act or omission taken in a judicial capacity.

Amend the title to read as follows: "To prohibit injunctive relief, or an award of costs, including attorney's fees, against a judicial officer for action taken in a judicial capacity.".

VI. Section-by-Section Analysis

Section 1: This section amends 42 U.S.C. 1988 to prohibit costs, including attorney's fees, against a State judge for acts or omissions taken in a judicial capacity that are not in excess of such offi-

cer's jurisdiction. This section also bars injunctive relief unless a declaratory decree is violated or declaratory relief is unavailable.

Section 2: This section amends 42 U.S.C. 1983 to prohibit a Federal court from enjoining a State judge unless a declaratory decree is violated or declaratory relief is unavailable.

Section 3: This section prohibits costs, including attorney's fees, against a Federal as well as a State judge under any other provision of law, including the potential for costs, including attorney's fees, under the so-called "Bivens actions" alleging constitutional torts by Federal judges.

VII. Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, August 1, 1990.

Hon. Joseph R. Biden, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 590, a bill to prohibit injunctive relief, or an award of costs, including attorney's fees, against a judicial officer for action taken in a judicial capacity, as ordered reported by the Senate Committee on the Judiciary, July 26, 1990. We estimate that no cost to the federal government and some small cost savings to state and local governments would result from enactment of this bill.

In actions brought against a judicial officer for an act or omission committed in such officer's judicial capacity, S. 590 would prohibit:

Awards of costs, including attorney's fees; and

Injunctive relief, unless a declaratory decree was violated or declaratory relief was unavailable.

S. 590 would almost never affect a federal judicial officer and would have no impact on the federal budget. Based on information from the Administrative Office of the U.S. Courts, we estimate that enactment of the bill would result in cost savings to state and local governments, to the extent that such governments would have assumed responsibility for defending such judicial officers and for any awards of attorney's fees. We cannot estimate the amounts of such savings, but they would be small because such awards are rare.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mitchell Rosenfeld, who can be reached at 226-2860.

Sincerely,

Robert D. Reischauer,
Director.

VIII. Regulatory Impact Statement

Pursuant to paragraph 11(b), rule XXVI, of the Standing Rules of the Senate, the committee, after due consideration, concludes that the act will not have a direct regulatory impact.

IX. MINORITY VIEWS OF MESSRS. METZENBAUM, BIDEN, KENNEDY, AND SIMON

S. 590 is a well-intentioned effort to protect the independence of State court judges when potential exposure to liability for attorney's fees might hamper their ability to carry out their responsibilities efficiently and forthrightly. That is a worthwhile objective shared by all of us.

Unfortunately, S. 590 goes too far in restricting the ability of citizens to obtain relief in Federal court for violations of their constitutional rights. In addition to eliminating the availability of attorney's fees for prevailing plaintiffs in civil rights actions against State court judges, the bill would severely curtail the availability of injunctive and declaratory relief in such actions. In its current form, S. 590 would unduly restrict these very important, though rarely obtained, tools for protecting the supremacy of constitutional rights in our Federal system.

Under existing precedents, it is already difficult to maintain a successful civil rights action against a State judge. State judges enjoy absolute immunity from suits for monetary damages which arise from acts in their judicial capacity, *Stump* v. *Sparkman*, 435 U.S. 349 (1978); *Pierson* v. *Ray*, 386 U.S. 547 (1967); and they receive qualified immunity from damage suits challenging nonjudicial actions, *Forrester* v. *White*, 56 U.S.L.W. 4067, 4068 (1988).

To obtain injunctive relief in any proceeding, one must demonstrate that there is no adequate remedy at law, and a serious risk of irreparable harm. See *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 506–07 (1959). And if an injunction is sought against pending State court proceedings, principles of comity and federalism dictate that "even irreparable injury is insufficient unless it is both 'great and immediate.' " *Younger* v. *Harris*, 401 U.S. 37, 46 (1971), quoting *Fenner* v. *Boykin*, 271 U.S. 240, 243–44 (1926). Thus, as the court indicated in *Pulliam* v. *Allen*, 466 U.S. 522 (1984), injunctive relief against a State court judge will be appropriated only where there are "really extraordinary causes." *Id.* at 538, quoting *Ex parte Fahey*, 332 U.S. 258, 260 (1947).

As the Supreme Court recognized in the *Pulliam* case, however, there are occasions when injunctive and declaratory relief are necessary to protect constitutional rights. *Pulliam* itself provides a compelling example. There, a magistrate followed the clearly unconstitutional practice of imposing bail on persons arrested for nonjailable offenses and incarcerating those persons if they could not make bail. Writing for the majority, Justice Blackmun pointed out that "the nature and short duration of the pretrial detention imposed * * * was such that it may have been impossible" for the plantiffs to obtain redress through the State courts. *Pulliam* v. *Allen*, 466 U.S. at 542 n. 22. In such a situation, as the Court ruled,

declaratory and injunctive relief in Federal court may be necessary to vindicate rights guaranteed by the Constitution.

In our view, current law strikes an appropriate balance between assuring judicial independence, respecting the principle of comity and federalism, and protecting the right of citizens to obtain relief form violations of their civil rights. S. 590 would upset this balance and unduly restrict the availability of equitable relief.

The bill would bar a Federal court from granting injunctive relief against State judges, "unless a declaratory decree was violated or declaratory relief was unavailable." Thus, even in the unconscionable situation where a State judge showed no intention of obeying a Federal court decree, civil rights plantiffs irreparably injured by the judge's ongoing constitutional violations could not obtain an injunction until they had gone through the cumbersome process of obtaining declaratory relief. Such an inflexible requirement would undoubtedly delay the just resolution of some cases, particularly those which involve clear constitutional violations by recalcitrant defendants.

This new proposed limitation would operate to deprive the Federal courts of a vital tool for protecting constitutional rights. Perhaps this intrusion upon the capacity of Federal courts to remedy constitutional violations might be justified if it could be shown that Federal courts were continually overstepping their bounds and fashioning broad injunctions that interfered with the operation of the State judiciary. Yet no such showing has been made. In the absence of any evidence of widespread abuse in the granting of declaratory and injunctive relief by Federal courts in civil rights actions against State judges, there is no justification for the drastic restriction contained in S. 590.

We have concerns about the attorney's fees provision as well. We fully appreciate the need to protect against the possibility that exposure to liability for attorney's fees to civil rights litigants might distort—or appear to distort—State judges' decisionmaking. But we are also aware that if attorney's fees cannot be awarded to prevailing plaintiffs in civil rights actions against State judges, then indigent victims of civil rights violations will frequently be unable to find attorneys to represent them in actions to vindicate their rights.

This was recognized by the Supreme Court in *Pulliam,* which cited language in the House Judiciary Committee Report on the Civil Rights Attorneys' Fees Act providing that:

> [I]t should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected.

Pulliam v. *Allen,* 466 U.S. at 527 n. 4, quoting H.R. Rep. No. 94–1558, p. 9 (1976).

The Court's holding in *Pulliam* squares fully with the purposes of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. 1988,

which was enacted to ensure that indigency would not serve as a bar to vindication of constitutional claims by civil rights plaintiffs:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in courts.

S. Rep. No. 94-1011, p. 2 (1976).

The facts of *Pulliam* illustrate how attorney's fee awards enhance access to justice for indigents with constitutional claims. The two plaintiffs in *Pulliam* were indigents charged with nonjailable misdemeanor offenses. However, both plaintiffs ended up spending a number of days in jail because they were too poor to post the bail set by the defendant State magistrate. Obviously, such people would have difficulty paying for the services of an attorney. Absent the availability of attorney's fees, the indigent plaintiffs in *Pulliam* likely would have been unable to contest the judge's practice of jailing people awaiting charges on offenses for which they could not be incarcerated if convicted.

The rationale for the ban on attorney's fees contained in S. 590 springs largely from concern that the Supreme Court's decision in *Pulliam* would unleash a flood of civil rights litigation against State court judges who would be personally liable for attorney's fees incurred by successful plaintiffs in such cases. This fear has not been borne out in the 4 years since the *Pulliam* case was decided. There are few reported cases of plaintiffs successfully obtaining injunctive relief against judges for violations of constitutional rights. In the rare cases in which a plaintiff has succeeded, there is not one reported instance of a judge having paid attorney's fees out of his or her pocket.

Most States already have statutes providing for the representation and indemnification of Government officials sued for acts undertaken within the scope of their duties. It is apparent that such statutes can protect judges from personal liability for attorney's fees assessed against them in civil rights cases. One solution to the threat to judicial independence assertedly created by the threat of liability for attorney's fees is for all States to include judges in coverage under State indemnification statutes.

We would hope that, before S. 590 is considered by the Senate, some means would be worked out whereby prevailing plaintiffs in civil rights actions against State judges could receive attorney's fees from a source other than the judges themselves.

HOWARD M. METZENBAUM.
JOSEPH R. BIDEN, JR.
EDWARD M. KENNEDY.
PAUL SIMON.

X. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets; new matter is printed in italic; existing law in which no change is proposed is shown in roman):

TITLE 42, UNITED STATES CODE

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TITLE 42—THE PUBLIC HEALTH AND WELFARE

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CHAPTER 21—CIVIL RIGHTS

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§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.], *except that in any action brought against a judicial officer for an act or omission committed in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.* For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of the Title "CIVIL RIGHTS," and the Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common

law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs[.], *except that in any action brought against a judicial officer for an act or omission committed in such officer's judicial capacity—*

(1) such officer shall not be liable for costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction; and

(2) injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

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